

MEMORANDUM

To: Parties in PSB Dockets 7508, 7589, 7590, 7670; Vermont Department of Public Service; Vermont Electric Distribution Utilities; Vermont Electric Power Company, Inc., Vermont Transo, LLC; and Vermont Public Power Supply Authority

From: Susan M. Hudson, Clerk of the Board

Re: Notice of April 28, 2011, Workshop on Confidentiality Considerations Related to Pricing and Other Terms in Electric Power Purchase Agreements

Date: March 15, 2011

Parties in several recent Public Service Board ("Board") proceedings have sought protective orders to keep confidential certain terms of electric power purchase agreements. The Board believes it would be beneficial to hold a workshop to explore issues related to the confidential treatment of power purchase agreements to help ensure that the interests of ratepayers and the public are appropriately evaluated and weighed by the Board in determining whether and how to protect commercially sensitive information in power purchase agreements. The workshop will not address confidentiality issues that are specific to a particular docket or power purchase agreement.

This memorandum is being provided to the parties in all recent dockets in which protective orders for contract terms have been sought, all other Vermont electric utilities and other persons who have recently filed requests or provided comments to the Board about these confidentiality issues. The Board is seeking broad participation in this workshop by interested and knowledgeable persons, and the recipients of this memorandum are encouraged to notify others, who they believe may be particularly interested and/or knowledgeable about this subject, about the opportunity to participate in this workshop. The Board is particularly interested in learning more about the confidentiality practices of other states, the Federal Energy Regulatory Commission ("FERC") and the Independent System Operator of New England ("ISO-NE") with respect to the terms of power purchase agreements.

Among the issues, questions and areas of interest the Board would like to focus on are the following:

A. Confidential treatment of contract terms in tariff filings. In a recent tariff filing, a distribution utility sought to keep some contracted power prices confidential. As the Board noted, "it is unusual, possibly unprecedented, for a Vermont electric distribution utility to request confidential treatment of materials supporting a request for a tariff change."¹

1. Is it appropriate for the Board to protect contract pricing information in tariff filings from public disclosure?
2. What, if anything, has changed that would justify keeping confidential any information in tariff filings that has traditionally been public?
3. Assuming it is appropriate to extend confidentiality treatment to protect certain contract price information in tariff filings, what procedures should the Board adopt to provide for the adjudication of confidentiality requests in the context of those tariff filings that do not result or develop into rate investigations?

B. Duration of confidential treatment. The Board's protective orders routinely advise parties that they have a "continuing obligation to reexamine protected information" and to allow for the public release of material that would no longer cause competitive harm. It is not apparent that this reminder actually works in practice, and the Board wishes to explore whether it would be better to set a shorter duration for protective orders (possibly, one to three years) and require the parties to file motions to extend the protective orders, if desired, 30 to 90 days prior to the expiration of such term, with averments that provide a specific explanation as to why the information should continue to receive confidential treatment.

1. Would such protective order renewal requirements be unduly burdensome?
2. How flexible and dependent on circumstances should the Board be in determining the duration of protective orders?
3. Are there any contract terms that should be kept confidential for longer periods, perhaps even for the entire term of the purchase agreement?
4. Is it appropriate for the Board to keep pricing or other contract terms confidential after the expiration of the power purchase agreement, particularly if the term of agreement is relatively short?

1. Protective Order, dated February , 2011, at 3 re Tariff Filing No. 8195 (Vermont Electric Cooperative, Inc.).

C. General standards to be applied by the Board in ruling on motions for protective orders. The Board is of the view that its power to grant protective orders is primarily based on 30 V.S.A. § 9, which gives the Board the powers of a court of record with respect to matters within the Board's jurisdiction, and that, in exercising that power, the Board is not necessarily constrained by the specific exceptions set forth in the Vermont access to public records law, specifically 1 V.S.A. § 317(c).² Starting from a rebuttable presumption in favor of the non-confidential treatment of information, the critical consideration for the Board has been whether confidential treatment is consistent with the broadly-defined underlying interests of ratepayers and the public, including the relative costs and benefits to them of keeping certain information confidential.

1. The Board welcomes any comments with respect to the Board's views as to its powers or as to standards the Board should apply in ruling on motions for protective orders.

2. The Board notes that parties seeking protective orders in Board proceedings often make the argument that the information constitutes a "trade secret," seemingly invoking the public document exception in 1 V.S.A. § 317(c)(9).³ Is that the appropriate standard for the Board to apply when adjudicating motions for protective orders, especially when it comes to the pricing terms of power purchase agreements, which have historically been publicly available?⁴

3. Although the Board may decline to provide confidential treatment without a request from any party to deny such treatment, the Board generally resolves issues about confidentiality only when there is a genuine disagreement about the confidential nature of information. When the motion for a protective order is not contested, the Board will review the motion and supporting averments to ensure that a *prima facie* case has been made for keeping the information under seal. The Board believes that requiring only a *prima facie* showing for an uncontested motion is appropriate given that the Board specifically allows any party or other person to subsequently challenge the protective order by seeking an amendment or modification of it. Is the Board's approach to resolving

2. It is the Board's view that once the Board issues a protective order that any unredacted documents subject to the protective order constitute "records which by law are designated confidential" under 1 V.S.A. § 317(c)(1) and are therefore exempt from public access under the access to public records law.

3. The public document exception in 1 V.S.A. § 317(b)(9) covers:

(9) trade secrets, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it. . . .

4. The Board notes that trade secrets may include internal compilations of financial information that is shared with a public agency in connection with a contract bid. *Springfield Terminal Railway Co. v. Agency of Transportation*, 174 Vt. 341 (2002).

confidentiality issues appropriate or should a higher standard than a *prima facie* showing be required even when none of the other parties opposes the motion for a protective order?

4. In recent dockets, the Board has noted a lack of specificity in the averments of the parties seeking protective orders. Is it appropriate for the Board to demand a greater specificity with respect to each item of information for which confidentiality is sought? Can the Board determine the costs and benefits to ratepayers and the public of keeping specific information confidential (even on a *prima facie* basis) without more focused and contract-specific averments? How and to what extent should the Board test general averments as to the competitive disadvantage that will result from disclosure?

D. Particular issues involving confidentiality of power purchase agreement terms. Based on the arguments advanced in recent Board proceedings in which a party sought confidential treatment of certain terms in power purchase agreements, it appears that public disclosure of certain information in a power purchase agreement may negatively affect Vermont distribution utilities, and indirectly ratepayers and the public, in one of two ways. First, public disclosure of certain contract terms could put a Vermont distribution utility at a competitive disadvantage in negotiating future power purchase agreements as potential suppliers will obtain valuable knowledge about the prices, terms and concessions previously agreed to by the distribution utility.⁵ Second, the prospect of public disclosure of certain contract terms may affect the willingness of out-of-state power suppliers either to enter into power contracts with Vermont distribution utilities or to make unusual concessions that, if they became public, could set a precedent for future negotiations with other buyers. On the other hand, these considerations must be weighed against all the benefits of public disclosure and against the fact that, without public disclosure of contract terms, ratepayers and the public will be hindered in their ability to understand, and judge for themselves, the relative costs and benefits of power purchase agreements.

1. The Board welcomes any comments with respect to the particular standards the Board should apply in ruling on motions for protective orders related to specific contract terms in power purchase agreements.

2. From the standpoint of the distribution utilities, are pricing terms often less commercially sensitive than certain other terms in power purchase contracts, such as credit support requirements?

3. From the standpoint of ratepayers and the public, the price to be paid for power under a long-term contract would appear to be the information as to which there is the greatest interest in public disclosure. Is this correct? How relevant to future potential

5. It is also possible that a power purchase agreement may contain non-public information (for example, in its schedules, exhibits and attachments) that could bring more general competitive harm to the utility if publicly disclosed.

suppliers of power is the price a distribution utility is willing to pay at a particular time for a particular resource at a particular location?⁶

4. The Board takes the position that the parties to a power purchase agreement cannot solely through their own agreement shield terms of the contract from public view in a Board proceeding. Accordingly, the Board has independently judged the merits of the motion for a protective order without regard to such provisions in the power purchase agreement. Is this appropriate?

5. Recently, the Board has distinguished between agreements under which a Vermont utility has purchased all or substantially all of the output of a generation facility from those in which a Vermont utility purchases only a portion of the output, suggesting that the argument for confidentiality from the perspective of the seller may be less persuasive in the first instance. Is such a distinction appropriate at least in some cases?

6. When the Board evaluates power purchases at above-market rates in light of other considerations such as renewable attributes and environmental benefits, does this heighten the need for public disclosure of pricing terms? Don't ratepayers and the public need sufficiently detailed information in order to evaluate whether the Board is making the appropriate trade-offs between price and other considerations in approving a power purchase under Section 248?

7. In addition to Vermont public policy preferences in favor of greater public disclosure, the general value of transparency, the facilitation of informed public input, debate and participation in Board proceedings, and the enhanced opportunity for informed discussion and analysis of Board decisions and of Vermont electric utilities, generally, by the public, the media, consultants and academic researchers, it can be argued that greater public disclosure of contract terms would result in a more informed and efficient market for the purchase and sale of wholesale power. Yet the emergence of a more competitive

6. As the Board stated in a recent Order:

Given the volatility in the electricity market, it is difficult to compare the price paid for power at one point in time with the price paid for a similar amount of power a few months later. In addition, there are a variety of generation options available, each with its own characteristics and commanding a different price. For example, intermittent, renewable generation would likely command a different price than baseload, fossil-fuel-fired generation or baseload, renewable generation. Even within the category of intermittent, renewable generation, the price terms would likely be significantly different for a solar project whose output generally coincides with peak demand and a wind project whose output generally coincides with off-peak demand. Further, the location of the generation project with respect to areas identified as congested by the Independent System Operator of New England would also play a factor in determining the appropriate price terms.

Petition of Georgia Mountain Community Wind, LLC, for a Certificate of Public Good, Docket 7508, Order of 12/9/10 at 4.

market for wholesale power seems to have resulted in increased efforts by the parties to wholesale power agreements to keep terms of such agreements confidential. Is this a case where the interests of individual electric generators and distribution utilities may diverge from the greater societal interest in more disclosure, at least at the national level?

a. The Board seeks more information about the practices of other states, FERC and ISO-NE as it relates to protecting the confidentiality of contract terms for the purchase of power.

b. To what extent have other states, FERC and ISO-NE considered public interest and market efficiency arguments in assessing the value of greater public disclosure of the terms of wholesale power purchase agreements?

c. To what extent is there agreement or disagreement as to the accuracy of any of the following statements:

(i) Greater transparency about the specific terms of power purchase agreements is desirable both because of the public interest and because competitive markets tend to operate more efficiently when market participants have greater information.

(ii) There is a national trend toward keeping the terms of power purchase agreements confidential.

(iii) In most, if not almost all, jurisdictions, outside of Vermont, price and credit terms relating to wholesale power agreements are regarded as commercially sensitive and are typically not disclosed to the public.

(iv) There is legitimate concern that requiring Vermont distribution utilities to publicly disclose commercially sensitive power purchase terms may put them at a competitive disadvantage in relation to out-of-state sellers and buyers of power that are not subject to similar public disclosure requirements.

(v) Public disclosure of certain terms of power purchase agreements will undermine the bargaining position of Vermont utilities and lead to higher rates for their customers.

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The Board has appointed staff attorney Lars Bang-Jensen to conduct the workshop, with participation by other Board staff, beginning at 1:30 p.m. on Thursday, April 28, 2011. The workshop will be held in the Board's Hearing Room, located on the Third Floor

of the People's United Bank Building (f/k/a Chittenden Bank Building), at 112 State Street, Montpelier, Vermont.

The workshop will be recorded by a court reporter. Anyone who wishes to submit comments to the Board prior to the workshop is encouraged to do so no later than April 18, 2011. Given that all interested persons may not receive copies of filings, the Board intends to post filed comments on its website at <http://psb.vermont.gov>. Accordingly, anyone submitting comments to the Board is asked to do so electronically (that is, by e-mail or e-mail attachment to psb.clerk@state.vt.us).

cc: Donald M. Kreis, Vermont Law School
Vermont Independent Power Producers Association
John McClaughry